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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1016

FEDERAL POWER COMMISSION,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY, et al.,
Respondents.

No. 71-1040

UNITED GAS PIPE LINE COMPANY, et al.,
Petitioners,

v.

LOUISIANA POWER & LIGHT COMPANY, et al.,
Respondents.

BRIEF OF THE CITY OF NEW YORK, *AMICUS CURIAE*

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Interest of the *Amicus Curiae*

The City of New York has a direct and substantial interest in the maximum availability of natural gas for use

in its area and more particularly in the various curtailment plans under consideration by the Federal Power Commission which are designed to alleviate the effects of present and future shortages of natural gas.

The decision of the court below would deprive the Federal Power Commission under the Natural Gas Act of jurisdiction with respect to curtailing natural gas deliveries by interstate pipelines to direct users, as distinguished from purchasers for resale. The effect of such a limitation on jurisdiction would result in a drastic reduction in the quantity of natural gas which would remain subject to allocation among consumers, including domestic users, in times of a natural gas shortage.

In this City, there are approximately 2,500,000 households which depend on the use of natural gas for the common necessities of life, rendering the use of gas indispensable to virtually all of its residents.[1] In addition, the City itself is a substantial user in its many public buildings such as schools, hospitals, libraries, museums and police and fire installations. It also has a vital interest in the maximum practicable supply of natural gas in aid of the difficult effort to meet local and Federal standards of air quality.

The City has intervened and will continue to seek intervention before the Federal Power Commission in curtailment proceedings affecting its area. Such proceedings will be conducted at a severe disadvantage if the decision of the court below is affirmed and the quantity of gas involved in direct sales is subtracted from the aggregate to be apportioned among other consumers according to a curtailment order.

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[1] By State law, the City is empowered to represent its residents in matters affecting utility service. *N.Y. Public Service Law*, § 109.

ARGUMENT

The Natural Gas Act authorizes the Federal Power Commission to exercise jurisdiction over curtailment of gas supply involving direct sales for consumptive use.

(1)

This controversy stems from the critical shortage of natural gas. The issue relates to the extent of the authority of the Federal Power Commission (Commission) under the Natural Gas Act (Act) to cope with it. The practical effect of the decision below would be to exempt substantial quantities of gas, sold for direct use, from curtailment plans in proceedings before the Commission by which available gas may be equitably allocated among consumers in order to serve the public interest.

The case on review in this Court originated in the United States District Court for the Western District of Louisiana wherein the Louisiana Power & Light Company (LP&L), respondent herein, sought an injunction requiring the United Gas Pipe Line Company (United), a petitioner herein, to make delivery of the full amount of natural gas provided by contract. As a direct customer, LP&L uses the gas as boiler fuel at one of its electric generating stations.[2] It contends that the Act does not confer jurisdiction on the Commission to entertain a curtailment plan involving its direct contractual purchases for consumptive purposes as distinguished from sales for resale.

At the time of the commencement of the action in the District Court, there was pending before the Commission

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[2] The petitions for certiorari granted herein also raise the contention that the court below erred in a secondary holding to the effect that the mixture of a relatively small quantity of interstate gas delivered to another of respondent's electric generating stations did not convert an otherwise local system to an interstate facility. This brief does not argue the point.

a curtailment proceeding involving all of United's deliveries, including those to LP&L. LP&L intervened and challenged the Commission's jurisdiction to curtail direct contractual sales, even though by means of transportation facilities previously certificated. Prior to the decision below but after the disposition of the action in the District Court, the Commission made its determination and held, among other things, that it had plenary jurisdiction under the Act to approve or modify curtailment plans involving gas transported both to direct and resale customers. Petitions for review of the Commission's decision are presently pending before the court below.

The final judgment of the District Court resulted in a dismissal of LP&L's complaint on the grounds that the Commission had exclusive jurisdiction over curtailments and that there had been a failure to exhaust administrative remedies. The Court of Appeals reversed on the ground that the Commission lacks jurisdiction to order curtailments in respect of the direct sales here involved. This Court granted certiorari.[3]

(2)

The three basic elements of Commission jurisdiction in relation to natural gas in interstate commerce are recited in Section 1 (b) of the Act. Its provisions apply (1) to transportation, (2) to sales for resale and (3) to companies engaged in either of those activities. As to sales, application is limited to those for resale. No corresponding limitation qualifies the Commission's jurisdiction over transportation or companies engaged in transportation.

It is contended that the Commission derives its jurisdiction over curtailment by reason of its express jurisdic-

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[3] While granting certiorari to review the judgment of the court below, this Court denied certiorari to review the order and opinion of the Commission before judgment on review by the court below.

tion over transportation. In *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507 (1947), this Court said that (p. 523):

> "the matter of interrupting service is one largely related * * * to transportation and thus within the jurisdiction of the Federal Power Commission to control * * *."

In construing the Act, the Court of Appeals discerned a jurisdictional gap or "no man's land"[4] in the powers which the Congress intended to confer on the Commission, predicated on the distinction in interstate transactions between sales for resale and direct sales to industrial customers. It decided that the Commission's authority to modify or impose conditions on a certificate of public convenience and necessity does not extend to a certificate issued for facilities to transport gas for direct use. The court found no such specific grant of power in the Act covering the lifespan of a transportation facility from the time of the Commission's issuance of a certificate under Section 7 (c) to the time of the Commission's approval of an abandonment under Section 7 (b). Not finding specific authority, the court concluded that none exists and that a direct use certificate once issued may not be later modified[5] in order to enable the Commission to include such gas in its consideration of curtailment plans.

(3)

A case which is of the greatest significance in relation to the extent of the Commission's authority in the issu-

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[4] *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, 11 (1957); cited in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19 (1961).

[5] Implicit in the lower court's holding is the recognition that construction certificates relating to resale gas are subject to the Commission's continuing jurisdiction.

ance of certificates for transportation facilities is *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961). There the natural gas in question was not for resale but was destined to be burned under boilers in the generation of electricity, just as in the case here in controversy.[6] The question was whether the Commission's jurisdiction was confined to the conventional tests for the issuance of a certificate under Section 7 (e), such as the adequacy of gas reserves and pipeline facilities and the market for the gas (p. 4), or whether, as the Commission contended, it was entitled to consider matters of "policy" embracing "end use" and "price". The Commission's argument was more fully described by this Court as including the contentions (p. 5):

> "that the gas was to be transported for use under industrial boilers, this disposition being an 'inferior' use from the standpoint of conserving a valuable natural resource; that authorization of this and similar direct sales to major industrial users would result in pre-emption of pipeline capacity and gas reserves to the detriment of domestic consumers competing for gas supply; and that the effect of this sale, as well as the resulting increase in direct sales, would effect a general rise in field prices."

This Court sustained the exercise of discretion by the Commission in taking cognizance of the foregoing factors and upheld the denial of the certificate. When the Court posed the first question (p. 8), "whether the Commission, through its certificate power, may prevent the waste of gas committed to its jurisdiction", it answered affirmatively. And when the Court stated the second question

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[6] The only difference is that United was the seller in the case at bar and Transcontinental was the transporter only, the gas having been purchased by the electric utility directly from producers in the field. The difference is of no moment since the issue in both cases depends on the Commission's jurisdiction over transportation.

(p. 25), "whether in a § 7 [certificate] proceeding the Commission may consider sales price," it also answered in favor of jurisdiction.

In so holding, the Court indicated that the issuance of a certificate for facilities to transport gas for other than resale is not to be so narrowly circumscribed as the Court of Appeals would construe the Act. If the Commission may take cognizance of "end use" and "price" considerations in the issuance of such a certificate, there would appear to be no basis for differentiating it from a certificate where the gas is to be resold insofar as the Commission's continuing jurisdiction over transportation may be concerned.

That the Act is not to be narrowly construed was made plain in *Transcontinental*. There the Court said (365 U.S. at pp. 19-20):

> ". . . when a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a 'no man's land' will be created. [citing case]. That is to say, in a borderline case where congressional authority is not explicit we must ask whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs."

And again (p. 28):

> "The point, is as we have stated, that Congress did not desire an 'attractive gap' in its regulatory scheme; rather, Congress intended to impose a comprehensive regulatory system on the transportation, production, and sale of this valuable natural resource. Therefore, when we are presented with an attempt by the federal authority to control a problem that is not, by its very nature, one with which state regulatory commissions

can be expected to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation."

Certainly, state commissions could not competently deal with a subject so inherently interstate as curtailment, and federal jurisdiction in the circumstances is, therefore, comprehensive and all-inclusive.

It is submitted that the decision in *Transcontinental* alone is sufficient to overcome the reasoning of the Court of Appeals. In addition, that court failed to give proper significance to other provisions of the Act which reinforce the Commission's authority. Sections 4 (b) and 5 (a) deal with the obligations of natural gas companies engaged in transportation, the third subject of Commission jurisdiction in Section 1 (b). Both of these sections relate to the proscription of undue preference in a variety of matters including, not merely rates but service, facilities and classifications of service as well. It may thus be concluded that the Commission has authority over curtailments involving undue preference irrespective of whether the gas is sold directly or for resale.

Furthermore, the Commission's continuing jurisdiction over all certificates may not be questioned in view of the omnibus powers in respect of its orders granted by Section 16. That section reads in part:

> "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter."

In *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), reference was made to Section 16. It was said (p. 776):

> "This Court has repeatedly held that the width of administrative authority must be measured in part by

the purposes for which it was conferred * * *. Surely the Commission's broad responsibilities therefore demand a generous construction of its statutory authority."

CONCLUSION

The judgment appealed from should be reversed.

March 17, 1972.

Respectfully submitted,

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On Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

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OPINIONS BELOW

The opinion of the court of appeals (United Pet. App. A, at 1a) is not yet reported. The opinion of the district court (A. 256; United Pet. App. C, at 30a) is reported at 332 F.Supp. 692.

JURISDICTION

The judgment of the court of appeals (United Pet. App. B, at 28a) was entered on January 14, 1972. The petitions in 71-1016 and 71-1040 were filed on February 7, 1972, and February 14, 1972, respectively. The petitions were granted March 6, 1972 (A. 273). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).